



GOVERNOR'S OFFICE OF
BUDGET AND PROGRAM PLANNING

Fiscal Note 2017 Biennium

Bill #	HB0427	Title:	Appropriate funds to defend state based water rights
Primary Sponsor:	Brown, Bob	Status:	As Introduced

- | | | |
|---|--|---|
| <input type="checkbox"/> Significant Local Gov Impact | <input type="checkbox"/> Needs to be included in HB 2 | <input checked="" type="checkbox"/> Technical Concerns |
| <input type="checkbox"/> Included in the Executive Budget | <input type="checkbox"/> Significant Long-Term Impacts | <input checked="" type="checkbox"/> Dedicated Revenue Form Attached |

FISCAL SUMMARY

	<u>FY 2015 Difference</u>	<u>FY 2016 Difference</u>	<u>FY 2017 Difference</u>	<u>FY 2018 Difference</u>	<u>FY 2019 Difference</u>
Expenditures:					
General Fund	\$13,000,000	\$0	\$0	\$0	\$0
State Special Revenue		----- Unknown -----			
Revenue:					
General Fund	\$0	\$0	\$0	\$0	\$0
State Special Revenue	\$13,000,000	\$0	\$0	\$0	\$0
Federal Special Revenue	\$0	\$0	\$0	\$0	\$0
Other	\$0	\$0	\$0	\$0	\$0
Net Impact-General Fund Balance	<u>(\$13,000,000)</u>	<u>\$0</u>	<u>\$0</u>	<u>\$0</u>	<u>\$0</u>

Description of fiscal impact: HB 427 creates a new water rights claims adjudication state special revenue account to be administered by the Department of Natural Resources and Conservation to examine water rights files on the Flathead Indian Reservation or by the Confederated Salish and Kootenai Tribes (CSKT). How DNRC would use those funds to adjudicate the water rights is undeterminable. In addition, the bill appropriates funds to the Office of the State Public Defender (OPD) for a state law-based water rights claims defense account. However, OPD is unable to determine if the appropriation is sufficient to conduct the necessary work. Further, the bill appropriates funds to the state Water Court, however the Judicial Branch is unable to determine the cost of this legislation other than the \$2 million appropriated.

FISCAL ANALYSIS

Assumptions:

Department of Natural Resources and Conservation (DNRC)

- Sections 1 and 2 of HB 427 appropriate \$6 million from the general fund and create a new water rights claims adjudication state special revenue account. This account is administered by DNRC and is to be used to examine water right claims filed on the Flathead Indian Reservation or by the CSKT. It assumed that the

\$6 million will be transferred from the general fund to the new account and the new account is statutorily appropriated.

2. Examination of tribal claims and post decree assistance by DNRC may be significantly different than existing procedures. This is due to: legal questions, exceptions, and the interplay between the CSKT and the federal government; and, the potential of early priority date filings, such as the date of the reservation or time immemorial which could fundamentally shift existing water distribution where tribal rights are filed. Incorporating these claims in adjoining basins in various decree phases will likely significantly complicate the existing processes and procedures under which the Montana Water Court and DNRC are currently working under. Additional work requirements by DNRC involving these claims will require additional time and resources not currently accounted for in general adjudication benchmarks, projected completion dates, or budget. The exact manner in which DNRC would use the \$6 million or if it would be sufficient to adjudicate water rights is undeterminable.

17-1-508, MCA, requires analysis of the statutory appropriation relative to the guidance in 17-1-508(3), MCA, to be published in the fiscal note. In reviewing and establishing statutory appropriations, the legislature shall consider the following guidelines.

	<u>YES</u>	<u>NO</u>
a. The money is from a continuing, reliable, and estimable source.	x	
b. The use of the appropriation or the expenditure occurrence is predictable and reliable.		x
c. The authority exists elsewhere.		x
d. An alternative appropriation method is available, practical, or effective.	x	
e. It appropriates state general fund money for purposes other than paying for emergency services.	x	
f. The money is used for general purposes.		x
g. The legislature wishes to review expenditure and appropriation levels each biennium.	x	
h. An expenditure cap and sunset date are excluded.	x	

Judicial Branch

3. New Section 1 and 3 of HB 427 appropriate \$2 million from the general funds and create a new Montana water court caseload account. It assumed that the \$2 million will be transferred from the general fund to the new account and the new account is statutorily appropriated.
4. The filing deadline for the CSKT claims has not yet arrived so the Judicial Branch is unable to determine how many claims the Tribe will file, what types of claims will be filed, or how many basins or potential parties will be impacted. The Water Court is unable to estimate the necessary spending in future years to adjudicate the claims filed. The exact manner in which the Water Court would use the \$2 million or if it would be sufficient to adjudicate water rights is undeterminable.

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	<u>YES</u>	<u>NO</u>
a. The money is from a continuing, reliable, and estimable source.	x	
b. The use of the appropriation or the expenditure occurrence is predictable and reliable.		x
c. The authority exists elsewhere.		x
d. An alternative appropriation method is available, practical, or effective.	x	
e. It appropriates state general fund money for purposes other than paying for emergency services.	x	
f. The money is used for general purposes.		x
g. The legislature wishes to review expenditure and appropriation levels each biennium.	x	
h. An expenditure cap and sunset date are excluded.	x	

Office of Public Defender (OPD)

5. New Section 1 and 4 of HB 427 appropriate \$5 million from the general funds and create a new state law-based water rights claims defense account. It assumed that the \$5 million will be transferred from the general fund to the new account and the new account is statutorily appropriated.
6. The water rights claims defense account is for the purpose of providing effective assistance of counsel to any person subject to a water court proceeding related to a water right filed by the Confederated Salish and Kootenai tribes. Water rights cases are currently outside the scope of OPD's responsibilities or area of expertise.
7. The filing deadline for the CSKT claims has not yet arrived so OPD is unable to determine how many claims the CSKT will file, what types of claims will be filed or how many basins, or potential parties will be impacted.
8. OPD's current workforce would be unable to assume the additional responsibilities of water rights litigation. The agency would have to contract with private attorneys to provide the necessary legal representation.
9. OPD currently pays contract attorneys \$62/hour and a \$25 monthly expense stipend. This rate will not be sufficient for the level of expertise required for these claims.
10. OPD is unable to estimate the necessary spending in future years to provide effective assistance of counsel to persons who are subject to court proceedings related to a water rights claim filed by CSKT.
11. The exact manner in which OPD would use the \$5 million or if it would be sufficient to adjudicate water rights is undeterminable.

17-1-508, MCA, requires analysis of the statutory appropriation relative to the guidance in 17-1-508(3), MCA, to be published in the fiscal note. In reviewing and establishing statutory appropriations, the legislature shall consider the following guidelines.

	<u>YES</u>	<u>NO</u>
a. The money is from a continuing, reliable, and estimable source.	x	

b. The use of the appropriation or the expenditure occurrence is predictable and reliable.		x
c. The authority exists elsewhere.		x
d. An alternative appropriation method is available, practical, or effective.	x	
e. It appropriates state general fund money for purposes other than paying for emergency services.	x	
f. The money is used for general purposes.		x
g. The legislature wishes to review expenditure and appropriation levels each biennium.	x	
h. An expenditure cap and sunset date are excluded.	x	

	<u>FY 2015 Difference</u>	<u>FY 2016 Difference</u>	<u>FY 2017 Difference</u>	<u>FY 2018 Difference</u>	<u>FY 2019 Difference</u>
<u>Fiscal Impact:</u>					
<u>Expenditures:</u>					
Personal Services	\$0		----- Unknown -----		
Operating Expenses	\$0		----- Unknown -----		
Transfers	\$13,000,000	\$0	\$0	\$0	\$0
TOTAL Expenditures	<u>\$13,000,000</u>	<u>\$0</u>	<u>\$0</u>	<u>\$0</u>	<u>\$0</u>
<u>Funding of Expenditures:</u>					
General Fund (01)	\$13,000,000	\$0	\$0	\$0	\$0
State Special Rev (02) - DNRC	\$0		----- Unknown -----		
State Special Rev (02) - Jud.	\$0		----- Unknown -----		
State Special Rev (02) - OPD	\$0		----- Unknown -----		
TOTAL Funding of Exp.	<u>\$13,000,000</u>	<u>\$0</u>	<u>\$0</u>	<u>\$0</u>	<u>\$0</u>
<u>Revenues:</u>					
General Fund (01)	\$0	\$0	\$0	\$0	\$0
State Special Rev (02) - DNRC	\$6,000,000	\$0	\$0	\$0	\$0
State Special Rev (02) - Jud.	\$2,000,000	\$0	\$0	\$0	\$0
State Special Rev (02) - OPD	\$5,000,000	\$0	\$0	\$0	\$0
TOTAL Revenues	<u>\$13,000,000</u>	<u>\$0</u>	<u>\$0</u>	<u>\$0</u>	<u>\$0</u>
<u>Net Impact to Fund Balance (Revenue minus Funding of Expenditures):</u>					
General Fund (01)	(\$13,000,000)	\$0	\$0	\$0	\$0
State Special Rev (02) - DNRC	\$6,000,000		----- Unknown -----		
State Special Rev (02) - Jud.	\$2,000,000		----- Unknown -----		
State Special Rev (02) - OPD	\$5,000,000		----- Unknown -----		

Technical Notes:**Department of Natural Resources and Conservation (DNRC)**

1. Creation of the water rights claims adjudication state special revenue account in Section 2 appears to conflict with the already existing water adjudication state special revenue account in current statute (85-2-280, MCA). HB 427 also appears to conflict with the adjudication benchmarks set in current statute under 85-2-271, MCA.

2. Water law is a highly specialized area of law requiring expertise not typically gained through a practice of criminal defense (Sections 6, 7, and 8).
3. The water right claims examination rules do not currently address the examination of tribal reserved water rights like those that would be filed by the Confederated Salish and Kootenai Tribes. Claims examination of tribal reserved water rights would likely require the promulgation of claims examination rules specific to those claims by the Montana Supreme Court.

Office of Public Defender (OPD)

4. New Section 4 refers to a “water court proceeding”. Section 6 states that the definition of “court” includes the Supreme Court, the Water Court, and a district court. Sections 6 and 7 refer to “court proceedings.” It is unclear if the obligation of a water rights defender to provide representation in a court proceeding related to water rights filed by the Confederated Salish and Kootenai tribes includes representation in federal courts including the United States Supreme Court.

Sponsor’s Initials

Date

Budget Director’s Initials

Date



Dedication of Revenue 2017 Biennium

17-1-507-509, MCA: Montana water court caseload account; State law-based water rights claims defense account; and State law-based water rights claims defense account

- a) **Are there persons or entities that benefit from this dedicated revenue that do not pay? (please explain)**

The revenue comes from the state general fund.

- b) **What special information or other advantages exist as a result of using a state special revenue fund that could not be obtained if the revenue were allocated to the general fund?**

The state special revenue guarantees a minimum level of funding for the activities defined in the bill.

- c) **Is the source of revenue relevant to current use of the funds and adequate to fund the program activity that is intended? Yes / No (if no, explain)**

The cost of the activities in the bill cannot be quantified, therefore it is unknown if the general fund transfers are sufficient.

- d) **Does the need for this state special revenue provision still exist? ☒ Yes ☐ No (Explain)**

- e) **Does the dedicated revenue affect the legislature's ability to scrutinize budgets, control expenditures, or establish priorities for state spending? (Please Explain)**

No – the legislature could examine the budget and expenditure of funds either in these state special revenue funds or in the general fund.

- f) **Does the dedicated revenue fulfill a continuing, legislatively recognized need? (Please Explain)**

Assuming the passage of HB 427, then yes the legislature has recognized the need.

- g) **How does the dedicated revenue provision result in accounting/auditing efficiencies or inefficiencies in your agency? (Please Explain. Also, if the program/activity were general funded, could you adequately account for the program/activity?)**

The agencies could account appropriately for the expenditures either in these state special revenue funds or in the general fund.